Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-1635

RAYMOND WESLEY FICKLIN, JR.,
RICHARD PAUL SEEFELDT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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RAYMOND WESLEY FICKLIN, JR.,
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Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioners, RAYMOND WESLEY FICKLIN, JR. and RICHARD PAUL SEEFELDT, pray that a writ of certiorari issue to review the judgment and memorandum opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on February 10, 1978.

OPINION BELOW

The opinion of the court below is unpublished. A copy of the memorandum opinion is attached to this petition as Appendix "A".

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit, was filed and entered on

February 10, 1978. A timely Petition for Rehearing was denied on March 28, 1978. A copy of the order denying the Petition for Rehearing is attached to this petition as Appendix "B". An extension of time in which to file this petition to and including May 18, 1978 was granted by Mr. Justice Rehnquist. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the stop of an automobile without a warrant and without probable cause is unreasonable within the meaning of the Fourth Amendment.

2. Whether a detention without probable cause or founded suspicion of criminality for the purpose of allowing sheriffs to conduct a "routine" radio check is an attenuated detention amounting to an illegal seizure of the person.

3. Whether a warrantless search made in the course of a detention extended to allow sheriffs to conduct a routine radio check of the persons detained is unreasonable.

4. Whether the slashing open by a deputy sheriff of a sealed, opaque, odorless package in order to examine its contents, constitutes an unreasonable general search in violation of the mandate of the Fourth Amendment.

5. Whether the "automobile exception" to the Fourth Amendment's warrant requirement excuses sheriffs from obtaining a warrant for the search of sealed, opaque,

odorless package located on a privately owned, non-commercial camper truck whose occupants are being detained without probable cause or founded suspicion of criminality at a distant location.

6. Whether the decision in this case, made without a hearing and contrary to Ninth Circuit Rule 3a, deprives Petitioners of due process and equal protection of the laws.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Fourth Amendment to the United States Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment due process clause:

"No person shall. . . be deprived of life, liberty, or property, without due process of law. . . ."

Ninth Circuit Rule 3(a), in pertinent part:

"Pursuant to Rule 34(b), Federal Rules of Appellate Procedure, there is hereby established a class of cases to be submitted without oral argument. There may be placed in this class any appeal . . . the questions

raised on appeal are, in the unanimous opinion of a panel of the court, of such a nature that oral argument would not be of assistance to the court.

"When a case has been classified for submission without oral argument, the clerk shall give the parties notice in writing of such action. . . ."

STATEMENT OF THE CASE

About 6:30 a.m. on April 12, 1977, in rural Nevada, Deputy Sheriff Bentley went to the reported location of an accident involving trucks. When he arrived, there were neither vehicles nor people about, but he noticed skid marks. Off the road he saw glass, part of a camper shell, and other accident debris. By radio he informed Deputy Brown that he was going to investigate a possible hit-and-run, generally asked for backup, and went looking for the trucks.

He noticed two trucks on a nearby dirt road. One, a green and white pickup, drove toward him (that is, in the direction of the paved highway). Bentley flagged it to a stop and started to talk with the driver, Seefeldt. While he and Seefeldt were conversing, Ficklin left the other truck, which was parked about 100 yards away, and joined the two men. He inquired of Seefeldt, "What's happening, Moe?" addressing him by the name boldly emblazoned on Seefeldt's hat. Bentley talked with both men, but neither suggested they were being investigated for a crime, nor ticketed otherwise charged them with

any type of offense. He asked Ficklin and Seefeldt for identification, which both provided. He then detained both men and initiated a "routine" radio check of them. While the three men were waiting, Deputies Brown and Vick arrived. Bentley told the deputies he felt something was wrong and ordered them to look over the other truck.

In response to Bentley's "feeling" Brown went to the other truck. It was a damaged blue and white pickup. On it he saw a number of large plastic bagged packages. The plastic was opaque and completely obscured the contents of the packages. He could not ascertain what was in them visually, by sense of smell or in any other way. Curious to know what was in the packages, he cut one open with a pocketknife. Through the cut, he saw a green, leafy substance which appeared to be marijuana. Excitedly, he radioed Bentley and told him to watch Ficklin and Seefeldt. Bentley, who was still detaining both men, arrested them. The deputy sheriffs then impounded the trucks and all the packages; obtained a search warrant; and completed a search of the trucks and the packages.

In a one-count indictment returned by the grand jury for the United States District Court, District of Nevada, Ficklin and Seefeldt were charged with possession with intent to distribute marijuana in violation of 21 U.S.C. §841(a)(1). Both men entered pleas of not guilty and made motions to suppress the evidence. The motions were denied and the men were tried jointly before a jury, the

Honorable Bruce R. Thompson, Judge presiding. The jury returned a verdict of guilty as to each defendant. Ficklin was sentenced to three years in the custody of the Attorney General, plus a special parole term of two years, and was ordered to pay a fine of $10,000. Seefeldt was sentenced to pay a fine of $6,000.

REASONS FOR GRANTING THE WRIT

A

The decision below, upholding the warrantless cutting open and searching of Petitioners' personal property was rendered despite the untoward circumstances of the case: the search took place after Deputy Sheriff Bentley, who knew nothing about it or its occupant[s], stopped a recreational truck [Petitioner Seefeldt's] while it was lawfully using a public road; after he had completed his inquiry of both Petitioners Seefeldt and Ficklin; while he was preventing them from continuing their travels, so he could make a "routine" radio check and send newly arrived-upon-the-scene Deputy Brown to look over a nearby camper truck [Petitioner Ficklin's], on a hunch; and because Deputy Brown wanted to satisfy his curiosity about the contents of the packages he saw on the camper truck.

In view of these facts, this case raises a series of questions of transcendent importance in the interpretation of the Fourth Amendment:

1. Does the "founded suspicion" doctrine enunciated in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968) and Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889 (1968), permit the stop of an automobile on less than probable cause where a border search is not involved?

In Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280 (1925), this Court determined that persons entitled to use the public highways and byways "have a right to free passage without interruption or search [except upon] . . . probable cause for believing that their vehicles are carrying contraband or illegal merchandise." (267 U.S. at 154). Recognizing that there is some tension between the dictates of the Fourth Amendment as interpreted in Carroll and the government's right to protect its borders, in a series of "border search" cases this Court has both reiterated the Carroll probable cause requirement (e.g., Almeida Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535 (1973), and modified it. E.g., United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074 (1976); United States v. Ortiz, 422 U.S. 891, 95 S.Ct. 2585 (1975); United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2575 (1975). Its attention has, however, been directed toward situations involving the special concerns of the Border Patrol. Apart from the border search cases, this Court has not enunciated the permissible bounds for an investigatory stop of an automobile upon a public highway. (In Rios v. United States, 364 U.S. 253, 80 S.Ct. 1431 [1960], the issue was presented, but was left unresolved.)

The question is a recurrent one. Adopting direction from the seminal cases, Terry and Sibron, courts of appeal have approved investigatory auto stops on less than probable cause. Indeed, the threshhold determination below, holding valid the stop of one of the trucks, was based upon the founded suspicion rational. (Interestingly, the case relied on by the court, United States v. Rocha-Lopez, 527 F.2d 476 [9th Cir. 1975], is a border search case).

The founded or reasonable suspicion doctrine evolved in personal contact situations. Terry v. Ohio, supra, 392 U.S. 1; Sibron v. New York, supra, 392 U.S. 40. See also, Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921 (1972). In such cases there is a specific and imminent threat of criminality and the particular person or persons against whom suspicion is directed are apparent. A similar direct contact with threatened crime and supposed criminals, absent probable cause, is not present when a law enforcement officer seeks to stop a vehicle. The intrusion is based upon more generalized information and reaches more sweepingly to encompass the guiltless with the guilty. In such circumstances, founded suspicion should not provide a constitutionally adequate basis to conduct an investigatory stop. In light of the stricture in Carroll that only probable cause justifies interfering with free passage on the public highways, this is a question the Court should address.

2. Is a "routine" radio check within the permissible scope of a detention?

This Court has not yet addressed itself to the qualitative and temporal limits of a detention reasonable in its inception. In Terry v. Ohio, supra, 392 U.S. at 20, this Court established two criteria against which the validity of a stop must be tested. The first requires a focus upon the officers' justification for its inception. The second asks whether the action is reasonably related in scope to the circumstances which justified the initial interference. Implicit in these criteria is the suggestion that a detention, initially reasonable, may become unreasonable because the officers' subsequent action changes the character of the intrusion either as to its nature or extent. United States v. Chambliss, 425 F.Supp. 1330 (E.D. Mich. 1977). Cf., United States v. Brignoni-Ponce, supra, 422 U.S. at 881-882.

Once an investigatory stop has produced full and complete responses to the detaining officers' inquiry and has developed no articulable facts creating probable cause relating to a particular crime, the justification for the initial intrustion is dissipated, the people detained have a right to be sent on their way. A further detention, for purposes of allowing an officer to make a "routine" radio check to find out if there are outstanding warrants for the person being delayed constitutes an invasion of personal liberty which must be deemed constitutionally impermissible. Cf., United States v. Brignoni-Ponce, supra, 422 U.S. at 881-882.

In general, law enforcement officers are not at liberty to stop, intrude upon, and detain individuals they

happen to encounter to determine if there are warrants outstanding against them. Such an intrusion would obviously not be based upon any cause whatsoever and might well be likened to a general search. Why then should it be permitted simply because the initial detention was proper? It should not, for both the nature of the inquiry and its duration then become governed, not by the actions reasonably necessary to be taken by the officer in the performance of his proper duty (engendered by the initial intrusion), "but instead by how long it takes to receive an 'all clear' from the source or sources to which he made inquiry." People v. Grace, 32 Cal.App.3d 447, 453, n.3, 108 Cal.Rptr. 66 (1973). See also, Barber v. Superior Court for County of San Diego, 38 Cal.App.3d 326, 106 Cal.Rptr. 304 (1973); People v. Bello, 45 Cal.App.3d 970, 119 Cal.Rptr. 838 (1975).

It is not uncommon for law enforcement officers to conduct "routine" radio checks based solely upon the fact that they have stopped a motorist for a lawful reason. Whether such checks amount to general searches and the attenuated detentions required to conduct them, to unlawful seizures, is a pressing question. An answer is needed for the guidance of law enforcement in its relations with the public; for the instruction of the people, to guide their response to the directives of officers of the law; and for the assistance of the judicial system in dealing with evidence and other consequences of "routine" radio checks and the detentions engendered by them.

3. Does the nondescript appearance of a package provide probable cause for a warrantless search?

The question is presented here in its most direct form. Deputy Brown, acting without any information or knowledge other than his fellow deputy's "feeling" that all was not right, saw a large plastic bundle and cut it open with his pocketknife to ascertain its contents. His sole justification was that 3 1/2 years earlier, in a class for law enforcement personnel, he had been instructed that marijuana is "sometimes" packaged "like that." The court below held that probable cause to search had been established.

The decision is contrary to countless state court decisions holding that the size and shape of a potential container, even coupled with suspicious circumstances known to the searching officer, is not enough for probable cause. E.g., People v. Odin, 36 N.Y.2d 382, 368 N.Y.Supp.2d 508 (1975); Remers v. Superior Court of Alameda County, 2 Cal.3d 659, 67 Cal.Rptr. 202 (1970); People v. Brown, 24 N.Y.2d 421, 301 N.Y.Supp.2d 18 (1969); People v. Corrado, 22 N.Y.2d 308, 292 N.Y.Supp.2d 648 (1968); People v. Colon, 81 Misc.2d 753, 367 N.Y.Supp.2d 412 (1975); Filitti v. Superior Court of Orange County, 23 Cal.App.3d 930, 100 Cal.Rptr. 583 (1972). Disregarding the legion of decisions to the contrary, the court below chose to establish a rule permitting warrantless searches of potential containers

because they could be used to package contraband. 1/ If allowed to stand, the rule will mean that every parcel may be searched without regard to the notion of privacy, for it cannot be gainsaid that some type of illegal substance "sometimes" is packaged "that way." People will no longer be entitled to expect privacy in their personal belongings, so long as all law enforcement officers can call those belongings "containers."

While it has been acknowledged that the definition of probable cause is "imprecise" (United States v. Watson, 423 U.S. 411, 455, 96 S.Ct. 820, 843, n.22 (1976) (Marshall, J., dissenting), it must have some delineation. If the Fourth Amendment's proscription of unreasonable searches and seizures and its requirement of probable cause is to have any significance, there must be articulated a definition (even if by a description of circumstances) which retains for persons their right of privacy in the contents of their boxes, packages, purses and bags and rejects searches based upon the mere potential of such items to be receptacles for contraband. Probable cause to search is not meant to be a concept so broad that it maximizes "the possibility of subjecting innocent people to the harassment and embarrassment of involuntary detention and a probing search of person or

1/ The court relied upon United States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973), cert. denied, 414 U.S. 1136 (1974). There, the searching officer had had personal experience with the somewhat distinctive packaging. Here, the packages were indistinguishable from any innocently wrapped personal goods being moved by private camper truck.

effects." United States v. Short, 570 F.2d 1051, 1054 (D.C. Cir. 1978). It is intended to protect the innocent from sweeping government interference into their personal effects. Cf., Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394 (1969). This Court should "define" probable cause to search in the circumstances of this case so as to give effect to the protective purposes of the Fourth Amendment.

4. Is the warrantless search of a package constitutionally permissible simply because it is located on a motor vehicle?

The Fourth Amendment stricture against unreasonable searches and seizures has as its basic purpose the safeguarding of individual privacy from governmental intrusion. United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476 (1977); Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727 (1967); Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1967). See also Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524 (1886). It expresses a principle "basic to a free society." Wolf v. Colorado, 338 U.S. 25, 27, 69 S.Ct. 1359 (1949). The role of the judicial warrant is deemed of prime importance in preserving the fundamental privacy purpose of the Fourth Amendment. See, e.g., United States v. Chadwick, supra, 433 U.S. 1; Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971); Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034 (1969); Camara v. Municipal Court, supra, 387 U.S. 523. Hence, a search made in the

absence of a warrant is unreasonable, except in certain narrowly limited, specifically defined circumstances. United States v. United States District Court, 407 U.S. 297, 92 S.Ct. 2125 (1972); Coolidge v. New Hampshire, supra; Chimel v. California, supra; Katz v. United States, supra; Camara v. Municipal Court, supra; Jones v. United States, 357 U.S. 493, 78 S.Ct. 1253 (1958).

In light of the foregoing fundamental principles sharply limiting the circumstances in which a warrantless search may be conducted, even assuming probable cause, is a warrant for the search of a package excused because the package is on a private, non-commercial, recreational truck? In Chadwick this question was not reached as the relationship between automobile and footlocker was incidental to the case. Here, only the relationship between the truck and the package could explain the gross invasion of privacy which took place when the package was slashed apart.

This Court, in Chadwick, suggested that the proper focus must be upon the expectation of privacy in the object of the search, not on its mobility. A package, itself mobile or movable because it is situated in a truck, may have great indicia of privacy, as did the sealed, opaque, odorless plastic bundles in this case. 2/

2/ The court below decided that Petitioners had a lower expectation of privacy in the plastic bag than the defendants in Chadwick had in their footlocker. It is difficult to imagine a more emphatic expression of the expectation of privacy than that created when a person carefully wraps the contents of packages so that they

Thus, absent the factor injected by the truck, the prior decisions of this Court, and particularly Chadwick, compel the conclusion that Petitioners were entitled to the neutral judgment of a magistrate before having their property cut open.

The "automobile exception," (here present by the fact that the searched property was on a truck), based as it is upon a person's lowered expectation of privacy in the vehicle, ought not to have excused the need for a warrant. For here, it was the personal property, not the automobile, which was to be searched. The court below disagreed with the latter analysis and rendered a decision which conflicts with principles of the recently announced Chadwick decision. The issue is an important one, squarely presented here.

Even where the privacy aspect of property is conceded, courts concerned with the "automobile exception" have looked to "mobility," equating it, as if it were a talismanic omen, with "exigency." (See, e.g., the opinion below, Appendix "A", p. 4). The decisions in Chadwick and in such cases as Coolidge v. New Hampshire, supra, 403 U.S. 443, strongly suggest that the equation misconstrues the mandate of the Fourth Amendment. The latter decisions indicate that where, as here, there is a

cannot be detected by any of the senses and are only revealed when one of the bundles is cut open. Even in Chadwick, the footlocker gave a hint of its contents because it leaked the cover up—talcum powder. Not so here, where the contents didn't even give off an odor.

clearly demonstrated claim of privacy, the "exigency" caused by the mobility of the property to be searched is obliged to give way to the constitutionally compelled preference for a judicial warrant; that the initial inquiry must be whether it is practicable to obtain a warrant. They further indicate that if a warrant is practicable, neither probable cause nor mobility excuses the absence of a warrant. While the latter analysis appears valid and in conformity with the dictates of the Constitution, the issue remains confused and should be clarified by the Court in this case.

B

The Court of Appeals for the Ninth Circuit recently promulgated a rule which permits a panel, in its unfettered discretion, to dispense with oral argument, Rule 3(a). According to its own announced procedure, when a panel decides to dispense with oral argument, it notifies counsel, who may, within ten days, submit additional authorities. No process for obtaining a review of the panel's decision to dispense with oral argument exists.

In the instant case, the panel acted under Rule 3(a). Petitioners sought review of the 3(a) determination to no avail. In a timely manner, they filed additional citations of authority. However, the court's decision was filed, in its final form, on the tenth day, clearly establishing that the decision had been made earlier and that no consideration could have been given to the later material

filed by Petitioners.

In all but those cases in which the panel so orders, litigants are entitled to a full appeal, including oral argument. A full hearing, including written and oral argument of counsel, is a due process requirement. Morgan v. United States, 298 U.S. 468, 480-481, 56 S.Ct. 906 (1936). Petitioners received neither full written nor oral argument, hence, they were denied due process.

The rule promulgated by the Ninth Circuit permits standardless, arbitrary decisions depriving some litigants of a full hearing. Those litigants, among whom are Petitioners, are invidiously discriminated against, for they have no idea what makes a case worthy of oral argument, they have no basis for appealing the panel's decision, and they are accorded no procedure for obtaining a review of the panel's determination. They are, thus, denied equality with other litigants.

To compound the injustice in this case, the panel did not follow its own procedure. Although announcing an opportunity to call to its attention additional authorities before making its decision, the panel made its decision before the opportunity had expired.

The issues presented to the court below were of substance. The court did not consider them in a full hearing nor in accordance with its own rule. It deprived Petitioners of due process and equal protection of the law. Since its rules and procedures make possible such deprivation of Fifth Amendment rights, they should be

reviewed by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
GOLDIN & GOLDIN

By MARTHA GOLDIN
Attorneys for Petitioners

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAYMOND WESLEY FICKLIN, JR., and RICHARD PAUL SEEFELDT, Defendants-Appellants.	No. 77-2923 77-3220 MEMORANDUM

FILED
Feb. 10, 1978
Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals

Appeal from the United States District Court
for the District of Nevada

Before: WRIGHT, CHOY and TANG, Circuit Judges.

Appellants were convicted of possessing marijuana with intent to distribute. On appeal, they contend that:

(a) their initial stop by police was illegal;

(b) a subsequent search occurred during an improper, attenuated detention;

(c) there was no probable cause to search;

(d) the warrantless search was per se unreasonable; and

(e) there was no evidence that appellant Seefeldt possessed the marijuana.

We find these contentions to be without merit.

APPENDIX "A"

FACTS:

Upon arriving at the scene of a traffic accident after the vehicles had departed, Officer Bentley observed a camper shell and debris. After requesting assistance from Officer Brown, Bentley saw two pickups, one of them damaged, on a dirt road off the main highway. The drivers of the vehicles approached Bentley, away from the damaged vehicle. Brown arrived and proceeded to investigate the damaged vehicle. He observed what he recognized to be large bags of marijuana in the back of the pickup and confirmed this belief by making a small cut in one bag.

DISCUSSION:

A brief investigatory detention is valid when the detaining officer has founded suspicion of criminal activity. United States v. Rocha-Lopez, 527 F.2d 476, 477-78 (9th Cir. 1975). The circumstances of the accident coupled with appellants' suspicious behavior (hurriedly fleeing the scene of the accident, abandoning a camper shell and meeting the officer away from the damaged truck), gave the officer a reasonably founded suspicion of criminal activity which led him to investigate.

The investigatory stop did not become unlawful because it was extended. In the period between the stop and the arrest, the officer's suspicion of criminal activity increased. He was justified in detaining the suspects until they plausibly explained their behavior.

Because the scope and duration of the investigative stop was reasonably related to the circumstances justifying it, the detention was not unduly attenuated and not unlawful. Terry v. Ohio, 392 U.S. 1, 19-20 (1967).

Regarding the ensuing search, two issues are presented: (1) whether the searching officer (Brown) acted on probable cause in cutting a two-inch slit in one bag found on the damaged truck; and (2) whether the search was per se unreasonable because conducted without a warrant.

Assuming that the searching officer did not have the benefit of information which had been revealed to the detaining officer (Bentley), nevertheless he had sufficient independent knowledge of the sequence of events which, when coupled with his observation of what he recognized as bundles of marijuana, supplied probable cause to search one bag. See United States v. Patterson, 492 F.2d 995, 997 (9th Cir. 1974).

This issue is controlled by United States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973), cert. denied, 414 U.S. 1136 (1974), in which we held there was probable cause to justify a warrantless search where, after a valid stop based on founded suspicion of an unrelated offense, an agent saw what he recognized to be packaged marijuana prior to initiating a search. Id. at 854.

It is not the case, as appellants contend, that since the stop was initially to investigate the possibility of a hit-and-run accident, the search of the bag was impermissibly broad. The officer saw the bags before he

started to search. His search was based on probable cause that contraband was being transported, not on probable cause that he would uncover evidence of a hit-and-run offense.

Appellants argue that even with probable cause the search was unreasonable because it was made without a warrant. We find that the exigencies of the situation were sufficient to allow a warrantless search.

The search fell within the "automobile exception" to the general warrant requirement. Chambers v. Maroney, 399 U.S. 42, 48 (1970). Appellants rely on United States v. Chadwick, ___ U.S. ___, 97 S.Ct. 2476 (1977), for the proposition that a search of "luggage" inside a vehicle is not within the automobile exception. The case before us is distinguishable.

Here, appellants could not have had as great an expectation of privacy in plastic and burlap bags (which the officer immediately recognized as the type customarily used to haul marijuana) as the Chadwick appellants had in a double-locked footlocker. ___ U.S. at ___, 97 S.Ct. at 2484. Moreover, the exigency here still existed at the time of the search. See United States v. Evans, 481 F.2d 990, 994 (9th Cir. 1973) (warrantless search of footlocker in an automobile upheld, finding exigent circumstances.

Other courts of appeals have construed the automobile exception to include searches of briefcases, suitcases and footlockers where there was probable cause to believe the containers concealed contraband, United

States v. Soriano, 497 F.2d 147, 149 (5th Cir. 1974), or narcotics, United States v. Tramunti, 513 F.2d 1087, 1104 (2d Cir. 1975).

Finally, appellant Seefeldt argues that there was insufficient evidence from which the jury could conclude that he possessed the marijuana.

"Possession" encompasses such dominion and control as to give power to dispose of the drug. While mere association with or proximity to property on which drugs are found is insufficient, it may be considered in connection with other circumstances to support a finding of possession which may be joint or constructive as well as actual and exclusive. United States v. Zumpano, 436 F.2d 535, 538 (9th Cir. 1970); Arellanes v. United States, 302 F.2d 603, 606 (9th Cir.), cert. denied, 371 U.S. 930 (1962).

There was evidence from which the jury could conclude that Seefeldt assisted in reloading the marijuana into the damaged truck, remained behind to clean up accident debris, lied to a passerby regarding the direction in which the damaged truck had gone, was found with Ficklin on a dirt road off the main highway, attempted to keep the approaching officer away from the marijuana-laden vehicle, misrepresented his relation with Ficklin, made statements inconsistent with other evidence, and was linked to Ficklin by fingerprint evidence in both trucks.

We are satisfied that there was sufficient evidence

from which the jury could conclude beyond a reasonable doubt that Seefeldt possessed the marijuana.

The convictions are affirmed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAYMOND WESLEY FICKLIN, JR., and RICHARD PAUL SEEFELDT, Defendants-Appellants.	)	NO. 77-2923 NO. 77-3220 ORDER

Before: WRIGHT, CHOY and TANG, Circuit Judges.

The panel as constituted in the above cases has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it. Fed. R. App. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

FILED
Mar. 28, 1978

Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals

APPENDIX "B"

Supreme Court, U. S.
FILED
AUG 1 1978
MICHAEL RODAK, JR., CLERK

No. 77-1635

In the Supreme Court of the United States

OCTOBER TERM, 1978

RAYMOND WESLEY FICKLIN, JR., AND RICHARD PAUL SEEFELDT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1635

RAYMOND WESLEY FICKLIN, JR., AND RICHARD PAUL SEEFELDT, PETITIONERS

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals was entered on February 10, 1978 (Pet. App. A; 569 F. 2d 352 (table)). A petition for rehearing was denied on March 28, 1978 (Pet. App. B).

JURISDICTION

Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including May 18, 1978, and the petition was filed on May 17, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether law enforcement officers may conduct a brief, investigatory stop of a motorist based on a founded suspicion of criminal activity.

2. Whether the initial stop of petitioners became unlawful because they were detained so that a radio check could be conducted.

3. Whether the warrantless search of a plastic-wrapped bundle in the bed of petitioner Ficklin's pickup truck violated the Fourth Amendment.

4. Whether petitioners were deprived of due process of law when the court of appeals affirmed their conviction without oral argument.

STATEMENT

After a jury trial in the United States District Court for the District of Nevada, petitioners were convicted of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Petitioner Ficklin was sentenced to three years' imprisonment and two years' special parole and was fined $10,000. Petitioner Seefeldt was fined $6,000. The court of appeals affirmed (Pet. App. A).

The facts adduced at the suppression hearing showed that at approximately 6:30 a.m. on April 12, 1977, Deputy Sheriff John Bentley was dispatched to the scene of a highway traffic accident in Lyon County, Nevada. When he arrived at the scene of the reported accident, he observed skid marks, debris, and a damaged camper shell, but no vehicles (Tr. 3-4, 13). Bentley radioed Officer Larry Brown for assistance in investigating the possibility of a hit-and-run accident. He advised Brown to be on the lookout for damaged vehicles and informed him that (because of the damaged camper shell) one of the vehicles might be a pickup truck (Tr. 4, 13, 36-37).

Bentley then began a search of the area for the automobiles involved. He noticed dust hanging in the air over a nearby dirt road, indicating to him that a vehicle must

recently have traveled the road. Bentley turned off the highway onto the road and saw two pickup trucks several hundred yards away. One of the trucks approached Bentley's car, while the other truck, which appeared to be damaged, remained stationary (Tr. 5-6, 16). Bentley stopped the truck when it reached his position. Petitioner Seefeldt got out of the vehicle, identified himself at Bentley's request, and told Bentley that "they were just up there riding motorcycles" (Tr. 7). When Bentley mentioned the accident, however, Seefeldt stated that he had helped the driver of the damaged truck "leave the scene of the accident so he wouldn't get in trouble" (*ibid.*). Seefeldt also stated that he did not know the other driver (*ibid.*).

Petitioner Ficklin then left the other truck, walked up the road and asked Seefeldt, "What's the matter, Moe?" (Tr. 8).[1] Seefeldt then acknowledged to the officer that he knew Ficklin after all (Tr. 8, 17-18). Shortly thereafter, Officer Brown arrived. Bentley instructed him to go down the road to the damaged truck and determine whether there was anything unusual about it. Bentley then conducted a radio check with police headquarters to determine whether there were outstanding warrants against petitioners or whether their vehicles were stolen (Tr. 8-9, 18-19, 40, 49).

As Officer Brown approached the damaged truck, he observed approximately 25 to 30 large, plastic-wrapped bundles in plain view in the open bed of the truck, and another bundle on the ground next to the truck. He knew from police instructional demonstrations that marijuana was packaged in that manner and also knew that local

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[1]Seefeldt wore a hat bearing the name "Moe" (Tr. 8).

agricultural products were not (Tr. 41-42). Brown therefore cut a two-inch slit in one of the bundles in the truck and observed marijuana inside (Tr. 43).

ARGUMENT

1. Petitioners contend (Pet. 7-10) that although *Terry* v. *Ohio*, 392 U.S. 1, and *Adams* v. *Williams*, 407 U.S. 143, permit a brief, investigatory stop of an individual based upon a founded suspicion of criminal activity, those cases are inapplicable to investigative detentions of motorists in vehicles. In essence, petitioners argue that the driver of an automobile may not be stopped unless there is probable cause to arrest him or to search the vehicle.

We note at the outset that petitioners did not raise this claim in the courts below.[2] Absent exceptional circumstances not present in this case, this Court has stated that it will decline to review an argument not that has not been raised in the courts below. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n. 7; *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362-363 n. 16.

In any event, petitioners' claim lacks merit. In *Terry* v. *Ohio*, *supra*, 392 U.S. at 22, the Court stated that the governmental interest "of effective crime prevention and

[2]In the district court and the court of appeals, petitioners argued only that the investigating officer lacked a founded suspicion to detain them (a claim they have apparently abandoned). See *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 881-882. As the district court correctly held (Pet. App. A-2), "[t]he circumstances of the accident coupled with [petitioners'] suspicious behavior (hurriedly leaving the scene of the accident, abandoning a camper shell and meeting the officer away from the damaged truck), gave the officer a reasonably founded suspicion of criminal activity which led him to investigate." Cf. *United States* v. *Pearson*, 448 F. 2d 1207, 1212 (C.A. 5).

detection * * * underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." Following *Terry*, the Court has emphasized that "it may be the essence of good police work to adopt an intermediate response." *Adams* v. *Williams*, *supra*, 407 U.S. at 145. The governmental interests sought to be protected by such investigatory measures are no less compelling when a suspicious individual is a motorist, rather than a pedestrian.[3] Nor is the intrusion of a brief, investigatory stop any greater merely because a vehicle is also involved. The principles articulated by the Court in *Terry* are thus equally applicable to investigative stops of vehicles. Indeed, to hold otherwise would mean that a criminal could escape detection simply because he was driving a vehicle at the time the officer's suspicions became aroused.

In *United States* v. *Brignoni-Ponce*, 422 U.S. 873, the Court held that investigative stops of vehicles based on a reasonable suspicion of criminal conduct are permissible in border areas (*id.* at 881-882, 884). Petitioners claim (Pet. 7) that, apart from this border search context, this Court has never upheld the legality of investigative stops of vehicles. In its decision in *Brignoni-Ponce*, however, the Court emphasized that it relied on the holding in *Terry* that limited investigative stops are "a valid method of protecting the public and preventing crime" (*id.* at 881). This general affirmation of the principles of *Terry* in the

[3]The need to utilize a brief stop in investigating suspected criminal activity would seem even more pronounced when the suspect is moving in a motor vehicle. See *Chambers* v. *Maroney*, 399 U.S. 42, 51.

context of investigative stops of vehicles does not suggest an intent to narrow the categories of criminal conduct that will justify investigative measures or to confine such measures to particular geographic areas. The courts of appeals have thus uniformly held that investigative stops of vehicles may be justified by reasonable suspicion of criminal conduct such as robbery (*United States* v. *Wright*, 565 F. 2d 486, 488-489 (C.A. 8), certiorari denied, No. 77-1130, April 17, 1978), bank robbery (*United States* v. *Gaines*, 563 F. 2d 1352, 1357 (C.A. 9); *United States* v. *Hall*, 557 F. 2d 1114, 1116-1117 (C.A. 5), certiorari denied, No. 77-5402, October 17, 1977), auto theft (*United States* v. *Solomon*, 528 F. 2d 88, 90-91 (C.A. 9)), and naroctics suggling (*United States* v. *Hickman*, 523 F. 2d 323, 327-328 (C.A. 9), certiorari denied, 423 U.S. 1050). Since there is no conflict among the circuits on this issue, there is no need for further review in this Court.[4]

2. Petitioners claim (Pet. 8-10) that even if the decision to initiate the investigation was justified, it was improper for the officer to detain petitioners pending a radio check to determine whether there were outstanding warrants against petitioners or whether their vehicles were stolen.[5]

As in *Terry* v. *Ohio*, *supra*, 392 U.S. at 29, however, the officer's investigative stop and inquiry was "reasonably related in scope to the justification for [its] initiation." There had been an accident, and the officer had reason to

[4]Finally, this argument seems inappropriate under the facts of this case since the truck containing the marijuana was at all times parked on the dirt road and was never stopped by the officers. While petitioner Seefeldt's truck was stopped, that stop was only indirectly related to the discovery of the marijuana.

[5]It was during this brief detention that Officer Brown discovered the marijuana.

believe one or both of the trucks may have been involved. This alone justified investigation. Petitioners' conduct when investigation was initiated served to reinforce suspicion that they were implicated in misconduct. Although petitioners identified themselves at Deputy Bentley's request, Seefeldt's responses to the officer's questions were awkward and contradictory. Seefeldt initially stated that he and Ficklin had been riding motorcycles. Subsequently, he stated that, although he did not know Ficklin, he had assisted him in leaving the scene of the accident "so he wouldn't get in trouble" (Tr. 7). Bentley's suspicions justifiably increased when Ficklin approached from the damaged vehicle and Seefeldt and Ficklin acknowledged that they knew each other. In these circumstances, it was reasonable for Bentley to investigate further the possibility that a hit-and-run incident had occurred and to determine the reason why Seefeldt and Ficklin had left the accident site. In light of petitioners' conduct, it was reasonable for the officer to suspect that the damaged vehicle may have been stolen (Tr. 57), and it was thus reasonable for the officer to conduct a radio check to verify or negate this possibility. See *United States* v. *Wylie*, 569 F. 2d 62, 68-71 (C.A. D.C.), certiorari denied, No. 77-6037, March 27, 1978; *United States* v. *O'Looney*, 544 F. 2d 385, 389 (C.A. 9), certiorari denied, 429 U.S. 1023.

3. Petitioners contend that the warrantless search of the plastic-wrapped bundle in the open bed of the damaged pickup truck violated the Fourth Amendment.

a. Petitioners first claim (Pet. 11-16) that Officer Brown lacked probable cause to make the two-inch slit in the covering of the bundle in order to search for marijuana. After a thorough review of the record, the district court concluded that there was probable cause to search (Tr. 57), and the court of appeals affirmed (Pet. App. A-3).

Officer Brown knew that there had been an early morning highway traffic accident and that the vehicle or vehicles involved had left the scene, abandoning a camper shell. He also knew that Deputy Bentley had located two pickup trucks on a nearby dirt road at a spot not visible from the highway and that Bentley was then engaged in questioning petitioners. Brown noticed that one of the trucks appeared to be damaged and therefore may have been involved in the reported accident. Approaching the truck to investigate further, Brown observed 25 to 30 large, plastic-wrapped bundles in the open bed of the truck and a similar bundle on the ground next to it. From training he had received in police instruction activities, Brown knew that marijuana was packaged in such a manner (Tr. 7-8). Brown therefore opened one of the packages and discovered that marijuana was indeed inside.

As the district court concluded (Tr. 57), the facts observed by Brown would indicate "[t]o anyone either trained or experienced in marijuana smuggling cases" that there was probable cause to believe that the packages contained marijuana. The facts that the vehicle was "overloaded with, some say thirty [bundles]," that the "camper shell had been knocked off the vehicle somehow" and that petitioners had then attempted to "secret[e] the two vehicles from view," all led the court to conclude that the officer possessed probable cause to conduct the search (*ibid.*). Here, as in *United States* v. *Patterson*, 492 F. 2d 995, 997 (C.A. 9), certiorari denied, 419 U.S. 846, the "totality of the evidence, to an experienced [officer] familiar with the methods employed" in transporting marijuana, established the requisite justification for the search. There is no reason for this Court to review the essentially factual determination of the courts below.

b. Petitioners further contend (Pet. 13-16) that, even if the search was based upon probable cause, the warrantless search of the bundle was invalid under this Court's decision in *United States* v. *Chadwick*, 433 U.S. 1. In *Chadwick*, a locked trunk had been removed to a federal building and inspected at a time when "there was no risk that whatever was contained in the footlocker trunk would be removed by the defendants or their associates" (*id.* at 4). In that context, the Court held that the warrantless inspection of the footlocker violated the Fourth Amendment (*id.* at 11): "There being no exigency, it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides" (*ibid.*).

Unlike the instant case, *Chadwick* did not involve the exigent circumstance presented when a motor vehicle is searched on the public highway on the basis of probable cause to believe that it contains evidence of a crime. See *Chambers* v. *Maroney*, 399 U.S. 42, 48-52.[6] *Chadwick* reaffirmed, however, that this Court has long "recognized significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts." 433 U.S. at 12. The Court stated that this distinction is "based in part on [an automobile's] inherent mobility, which often makes obtaining a judicial warrant impracticable," and in part on "the diminished expectation of privacy which surrounds the automobile" (*ibid.*).

The court of appeals properly concluded that the exigency that justifies a warrantless search of a car and its contents "still existed at the time of the search" in this

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[6]As the Court noted in *Chadwick*, *supra*, 433 U.S. at 11, the government did not contend that "the footlocker's brief contact with Chadwick's car makes this an automobile search * * *."

case (Pet. App. A-4). As this Court has held, the opportunity to search a car that "is readily movable" is "fleeting," and once the "occupants are alerted [to the officer's suspicions] * * * the car's contents may never be found again if a warrant must be obtained." *Chambers* v. *Maroney, supra,* 399 U.S. at 51. If the officer in this case had neither conducted the search of the contents of the truck nor seized the vehicle, it is apparent that the "fleeting" opportunity to investigate the suspected crime would have been lost. The search in this case thus fits comfortably within the confines of the traditional automobile search exception to the warrant requirement, which exception was not cut back by *Chadwick*.

Furthermore, as the court of appeals noted (Pet. App. A-4), petitioner's expectation of privacy for the plastic and burlap bags piled several feet high in the open back end of the pickup truck located on a public highway was not substantial, and was far less significant than that in *Chadwick*, where law-enforcement agents had opened a footlocker that had been secured by two locks. See 433 U.S. at 13. This reduced basis for a legitimate claim of privacy, coupled with the exigencies imposed by the circumstances, indicate that the officer's search was valid.

4. Pursuant to Rule 3(a) of the Rules of the United States Court of Appeals for the Ninth Circuit,[7] petitioners received written notice that their appeal would be decided

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[7]Rule 3(a) provides in pertinent part:

> Pursuant to Rule 34(b) of the Federal Rules of Appellate Procedure, there is hereby established a class of cases to be submitted without oral argument. There may be placed in this class any appeal, * * * in which * * * (b) the questions raised on appeal are, in the unanimous opinion of a panel of the court, of such a nature that oral argument would not be of assistance to the court.
>
> When a case has been classified for submission without oral argument, the clerk shall give the parties notice in writing of such action.

without oral argument and were invited to submit additional authorities in writing within ten days. They did so. Thereafter, the court of appeals affirmed petitioners' conviction by written opinion without oral argument. Petitioners contend (Pet. 16-18) that the court's disposition of their appeal without oral argument denied them due process of law and that the court failed to follow the procedures outlined in its own rule. Both contentions are without merit.

a. Oral argument is not a due process right guaranteed by the Fifth Amendment. As was held in *Federal Communications Commission* v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 276, "[c]ertainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed even substantial ones, are raised."[8] Following this decision, the courts of appeals uniformly have held that oral argument may be dispensed with where the court determines that it will not be of significant assistance to the resolution of the appellate controversy. *E.g., National Labor Relations Board* v. *Local* 42, *International Association of Heat and Frost Insulators and Asbestos Workers*, 476 F. 2d 275, 276 (C.A. 3) (*en banc*); *Huth* v. *Southern Pacific Co.*, 417 F. 2d 526, 529-530 (C.A. 5).[9]

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[8]Although the decision in the *WJR* case was made in the context of an administrative appeal, the Court indicated that its conclusion that the due process clause does not require oral argument applies also to "judicial tribunals of the federal system and the equally numerous and diversified interests affected by their functioning * * *" (*id.* at 275).

[9]Petitioners claim (Pet. 17) that *Morgan* v. *United States*, 298 U.S. 468, establishes that oral argument is a due process requirement. In fact, the Court held in *Morgan* that argument submitted in writing is sufficient (*id.* at 281). See *Federal Communications Commission* v. *WJR, The Goodwill Station Inc., supra,* 337 U.S. at 276.

b. Petitioners' second claim is based on the fact that the opinion below was rendered at the expiration of the ten day period within which additional authorities could be submitted. According to petitioners, that action "clearly establish[ed] that the decision had been made earlier and that no consideration could have been given to the later material filed" by petitioners (Pet. 16-17). In the first place, the rule itself makes no express provision for submission of additional authorities. See note 6, *supra*. Furthermore, petitioners' unsupported assertion that the court failed to consider the supplemental citations neglects to take into account that the opinion may have been prepared and held pending petitioners' submission. Indeed, petitioner have failed to suggest any supplemental authority that the court of appeals did not thoroughly consider or properly reject.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1978.

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